MOHAMED ISMAIL

v.

TAN SRI HAJI OSMAN SAAT & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
WAN YAHYA J
[ORIGINATING MOTION NO. 26 OF 1980]
20 SEPTEMBER 1981

CIVIL PROCEDURE: *Application by respondent to strike out proceedings - Applicants' action by motion and not writ - Whether proceedings rendered void; failure by applicant to entitle his motion - Effect of non-compliance with form prescribed under O. 8 r. 3 of the Rules of the High Court 1980 - Whether embarrassing or prejudicial to respondents - Whether Court could exercise discretion under O. 2, O. 92 r. 4 - Locus standi - Whether applicant had recognisable legal interest in matter - Whether oral submissions by respondents to strike out sufficient.*

CIVIL PROCEDURE: *Motion by applicant for leave to cross-examine deponent and another - Whether persons other than deponents could be ordered to attend Court for cross-examination - Order 38 r. 2(3).*

In 1972 the applicant and 183 others made application for State land in Mersing. Their names were submitted by the District Officer, Mersing, to the proper authorities. For over eight years and up to the date of application before the Court, no answer was received from the appropriate authorities. The applicant made a search in the land registry and found that seven pieces of State land in that area had already been alienated to the 1st respondent, the Menteri Besar of Johore, and a few other dignitaries. In December 1980, the applicant took out a motion against the Commissioner of Lands & Mines, Johore, the Johore Government and the 1st respondent.

Five days before the date of hearing, the 1st respondent alone filed a motion to strike out the proceedings and to expunge the affidavit of the applicant from the records of proceedings. The only affidavit in support of the motion appeared to be the one sworn by the 2nd respondent, who deposed that he was authorised by the 1st and 3rd respondents to make an affidavit on their behalf. Neither the 2nd nor the 3rd respondent had filed any motion to strike out the proceedings. The affidavit challenged the *locus standi* of the applicant to the relief on the ground that he had not sufficient interest in the matter; as the applicant had made no formal application; that the matter was still being administratively dealt with; and that the alienation of the land to the Mentri Besar and the others did not prejudice the applicant's chances, as there were vast unallotted lands still available in that area. The affidavit further alleged that the procedure adopted was wrong in law.

The applicant immediately filed a motion for leave to cross-examine the deponent and the 1st respondent. The hearing before the Court was confined to the two motions to strike out and to cross-examine.

Held:

A. Regarding the motion to strike out.

[1] On the question of procedure

(a) Though the action had been by motion and not by writ, the procedure adopted by the applicant merely rendered the proceedings irregular but by no means void. [*Haji Ismail bin Che Chik v. The State Commissioner. Penang* [1975] 1 MLJ 271 and *Sungai Wangi*

Estate v. Uni [1975] 1 MLJ 136 considered]. In such a case, if the Court is satisfied that all the parties involved will not be seriously embarrassed by the irregularity, and that such irregularity will not lead to injustice to any party, the Court may proceed to hear and determine the case. *[Haji Ismail case supra]*.

(b) The failure of the applicant to entitle his motion and his non-compliance of O. 8 r. 3 had neither embarrassed nor prejudiced the respondents. If by any chance they had been, embarrassed or prejudiced, they could have taken out summons for direction or they could have, after hearing the applicant's case, asked for an adjournment to prepare the reply, but the respondents had done neither. They had merely chosen to raise the objection at the hearing.

(c) The case was a proper one for the Court, to invoke the powers and exercise its discretion under O. 2 and O. 92 r. 4 of the Rules of the High Court and to rule the motion to proceed and be considered on its merits. Moreover, the applicant had an arguable issue to be tried. [*Merricks & Anor. v. Nott Bower & Anor.* [1964] 1 All ER 717].

[2] On the question of *locus standi* of the applicant.

The applicant had an interest in the matter which could be legally recognised.

(a) The applicant had made an application which was submitted to the Executive Council for consideration. He was entitled to a right to be considered and a formal reply from the Council. At that stage he acquired an interest in the form of his expectation in respect of his application (*Kuluwante v. Government of Malaysia* [1978] 1 MLJ 92). He became an "aggrieved person" when his application was ignored for eight years while large pieces of land in the vicinity were being allotted to the 1st respondent and the others.

(b) Even if the applicant was not an "aggrieved person" the applicant should, in the circumstances of the case and as a citizen, be properly construed as a person having sufficient interest in applying for a declaratory decree. If the allegation against the 1st respondent, that land had been alienated to him by the Executive Council in his presence and with his participation and connivance was true, it would constitute a serious and unlawful act by the State's senior-most member of the administration, for which act he could be exposed to both civil and criminal proceedings.

(c) The English authorities on the subject of "sufficient interest" in a judicial review applied equally to the Malaysian Courts. *Gouriet & Ors. v. Union of Post Office Workers* [1978] AC 435, in which the Privy Council held that only the Attorney-General could sue on behalf of the public for the purpose of preventing public wrongs, was distinguishable as it applies only to relator proceedings and not to prerogative writs. The above case was in fact distinguished in the subsequent Court of Appeal case of *R. v. Inland Revenue Commissioners* [1980] 2 All ER 378, where it was held that an applicant for judicial review of the action of a public authority need only establish that he had a sufficient interest in the matter. (*District Council Central Province Wellesley v. Yegappan* [1966] 2 MLJ 177; *Schmidt v. Secretary of State Home Affairs* [1969] 2 Ch. 149; *Attorney-General of the Gambia v. N'Jie* [1961] 2 All ER 511; *R. v. Creater London Council, ex parte Blackburn* [1976] 3 All ER 184 also considered).

The application by the 1st respondent was accordingly refused. The oral application by the 2nd and 3rd respondents to strike out the motion made when the 1st respondent's motion came up for hearing was also refused. An irregular application may be saved by O. 2 r. 1 but an impromptu oral application will necessarily embarrass not only the applicant but also the Court. Therefore the 2nd and 3rd respondents' submissions did not merit consideration.

B. Regarding the application for leave to cross-examine the deponent.

1. There shall be an order for the 2nd respondent to attend Court and be cross-examined at a subsequent date to be fixed by the Senior Assistant Registrar.

2. The application in respect of the 1st respondents must be refused. Order 38 r. 2(3) does not empower the Court to order the attendance for cross-examination of persons other than the deponents.

Cases referred to:
Haji Ismail bin Che Chik v. The State Commissioner, Penang [1975] 1 MLJ 271
Sungai Wangi Estate v. Uni [1975] 1 MLJ 136
Merricks & Anor. v. Nott Bower and Anor. [1964] 1 All ER 717
Gouriet and Ors. v. Union of Post Office Workers [1978] AC 435
R. v. Inland Revenue Commissioners [1980] 2 All ER 378
Kuluwante v. Government of Malaysia [1978] 1 MLJ 92
District Council Central Province Wellesley v. Yegappan [1966] 2 MLJ 177
Schmidt v. Secretary of State Home Affairs [1969] 2 Ch 149
Attorney-General of the Gambia v. N'Jie [1961] 2 All ER 504
R. v. Greater London Council, ex parte Blackburn [1976] 3 All ER 184

Legislation referred to:
Constitution of the state of Johor, art. lV(9)
Rules of the High Court 1980, O. 2 rr. 1, 2, O. 8 r. 3, O. 38 r. 2(3), O. 53, O. 92 r. 4
Specific Relief Act 1950, ss. 41, 42

Other source referred to:
"Judicial Review of Administrative Action", de Smith's

For the applicant - G.S. Nijar (Abdul Razak Ahmad with him); M/s. Ong Ban Chai & Co.
For the 1st respondent - C.K.G. Pillay (Dato' Hassan bin Haji Yunos with him)
For the 2nd & 3rd respondents - Alauddin bin Mohamed Shariff, Legal Advisor, Johore

JUDGMENT

Wan Yahya J:

On 27 May 1972, the applicant and 183 others made application for State land in Mersing. Their names were submitted by the District Officer, Mersing to the proper authorities. For over eight years the applicant waited in vain and up till the date of this application no answer came from the appropriate authorities. The applicant then made a search in the land registry and found that seven pieces of State land in that area had already been alienated to the 1st respondent, the Mentri Besar of Johore, and a few other dignitaries, whom the applicant's Counsel conceded before this Court have been unfortunately described as his cronies. The applicant alleges in his affidavit that the alienation process was carried out in the Exco in the presence and with the participation of the 1st respondent and four other Exco members. These gentlemen, it was alleged, approved various parcels of land to themselves as well as dignitaries of no less importance, ranking from a former Exco member to a Deputy Minister and a few Cabinet Ministers. He was understandably aggrieved by this decision, which he felt had not only jeopardized his right as an applicant for the land but also by the unlawful act of the 1st respondent. So on 23 December 1980, he took out a motion against both the Commissioner of Lands & Mines, the Johore Government and the 1st respondent, who was and still remains as the Mentri Besar of Johore.

The respondents did not respond to the allegations in the motion until 5 days before the date of hearing when the 1st respondent alone filed a motion to strike out the proceedings. This affidavit in effect challenged the *locus standi* of the applicant to the relief prayed on

the ground that he had not sufficient interest in the matter. This allegation of insufficient interest appears to be based on the fact that the applicant made no formal application but his name was merely one of the 184 names given for consideration for a fishermen's settlement scheme, that the matter was still being administratively dealt with and that the alienation of the land to the Mentri Besar and nine others did not prejudice the applicant's chance as there were vast unallotted lands still available in that area. The affidavit further alleges that the procedure adopted was wrong in law.

The applicant immediately filed a motion for leave to cross-examine the deponent, Dato' Haji Abdul Kadir bin Sam'on and the 1st respondent.

The hearing before this Court was therefore confined to the two motions to strike out and to cross-examine.

On the question of procedure it was submitted that this action should have been by a writ and not by a motion and that on the authorities of *Haji Ismail bin Che Chik v. The State Commissioner, Penang* [1975] 1 MLJ 271 and *Sungai Wangi Estate v. Uni* [1975] 1 MLJ 136, the Court should dismiss the application. In my opinion, both these cases are not proper propositions for dismissing a suit for irregular procedure. Although in both these cases the Court commented that the mode adopted by the applicants was inappropriate, it nevertheless went on to consider and determine each case on its merits. To my mind the procedure adopted by the applicant merely rendered the proceedings irregular but by no means void. In such a case, the Court may, if it is satisfied that the parties, their Counsel and the Court will not be seriously embarrassed by the irregularity and that such irregularity will not lead to injustice to any party, proceed to hear and determine the case. This point was discussed at p. 272 of *Haji Ismail's* case (*supra*) wherein Chang Min Tat J (as he then was) said at p. 272:

> All in all, it does appear to me that there is considerable substance in the contention of the learned Legal Adviser. On the other hand, however, there cannot be any serious embarrassment to the parties or their Counsel in presenting their contentions or to the Court in hearing the case and coming to a decision. No disputes of facts arise and the matter stands to be decided on a consideration whether there are powers to make the subsidiary legislation providing for an increased rental in the case of land hitherto held under a statutory land grant. For myself, if, in a summons for directions, any application was made in an action commenced by writ for similar reliefs for an order to try the action as on a motion, I would not have expected objection from the respondent and I would not myself have hesitated to make the order.

On the question of procedure an objection was further raised by the 1st respondent on the failure of the applicant to institute his motion. It was submitted that this amounted to non-compliance with the form prescribed under O. 8 r. 3 and that in turn it had left the respondent in the dark as to the legal nature of the relief claimed, i.e., whether it is under s. 41 or 42 of the Specific Relief Act, or under O. 53 of the Rules of the High Court, or under judicial review. The answer to this, as provided at the hearing itself, is that the applicant is proceeding under s. 41 of the Specific Relief Act as an adjunct to prerogative remedies.

The question for my immediate consideration however is whether the respondents were truly embarrassed, or in any way prejudiced by this slight omission. My view is that they were not. If by any chance they were, they could have taken out summons for directions or they could have, after hearing the applicant's case, asked for an adjournment to prepare the reply. The respondents did neither of these but merely chose to raise this only at the hearing. The eloquence and thoroughness with which Mr. C.K.G. Pillay, Counsel for the 1st respondent, addressed the Court and the contents of his written submission indicate anything but lack of preparedness and appreciation of the claim they were faced with.

I am of the view that this is a proper case to invoke the powers and exercise my discretion under O. 2 and O. 92 r. 4 of the Rules of the High Court and to rule the motion to proceed and be considered on its merits. Moreover the applicant had an arguable issue to be tried. (See *Merricks & Anor. v. Nott Bower & Anor.* [1964] 1 All ER 717).

The next and by far the most serious contention of the respondents in their application to strike out is the question of *locus standi* of the applicant. Mr. Pillay, reading from de Smith's "*Judicial Review of Administrative Action*", pointed out that for a declaration to be properly made there should be controversy between the parties involving the claimant's legally recognised interests and that the Court's intervention through the granting of declarations had been confined to 'immediate personal interest', or 'proprietary interest'. Counsel further contends that, although the trend propounded by Lord Denning that a wider qualification be given to the term 'interest' was gaining momentum in the English Courts, His Lordships 'escapades' were cut short by the House of Lords case of *Gouriet and Ors. v. Union of Post Office Workers* [1978] AC 435. In that case it was held *inter alia* that only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that the Courts had no jurisdiction to entertain a claim by a private individual who had suffered and would suffer damage from such public wrong.

Gouriet's case was however distinguished in the subsequent Court of Appeal case of *R. v. Inland Revenue Commissioners* [1980] 2 All ER 378. In this later case it was held that an applicant for judicial review of the action of a public authority need only establish that he had a sufficient interest in the matter.

Initially this may appear to be in conflict with the House of Lords decision in *Gouriet's* case. But this case is distinguishable if one has in mind that firstly *Gouriet's* case relates to a relator proceeding in respect of a wrong that could constitute a threatened criminal offence that has yet to be committed and secondly Mr. Gouriet's application for a declaration in that case was unsupported by any assertion of loss or damage by the projected interruption of the postal communication to and from South Africa and thirdly the ruling in *Gouriet's* case can only apply to relator proceedings and not to prerogative writs. The distinguishing factor is dealt with by Lord Denning himself in *R. v. Inland Revenue Commissioners, supra* at p. 388 in which His Lordship said:

> At first sight the House of Lords in *Gouriet v. Union of Post Office Workers* [1977] 3 All ER 70; [1978] AC 435 seem to have slammed the door against ordinary citizens coming to the Court, except one who has suffered a particular damage. But the decision was concerned only with relator actions. Lord Wilberforce pointed out that it did not apply to the prerogative writs such as *mandamus* or *certiorari.* He said [1977] 3 All ER 70 at 84, [1978] AC 435 at 482): 'These are often applied for by individuals and the Courts have allowed them liberal access under a generous conception of *Locus standi.'* It is these remedies that we are here concerned with. They apply only to public authorities, not to trade unions; so they were not available in *Gouriet's* case.

Then at p. 395 of the same case Lawton LJ expressed the distinguishing factor in the following passage:

> ... The Courts have come a long way since 1960 in allowing grievances against persons performing public duties and exercising statutory powers to be given a hearing in the Courts. The common law was alive to the mischief which was likely to arise if public officers could be sued by anyone with a grievance. Appreciation of this likely mischief resulted in the development of the restrictions imposed by the relator procedure. The restrictions of this procedure do not apply to prerogative orders (see the speech of Lord Wilberforce in *Gouriet v. Union of Post Office Workers* [1977] 3 All ER 70; [1978] AC 435 and the submission in that case made by Counsel for the Attorney General [1978] AC 435 at 446) ...

And lastly Ackner LJ at p. 398:

> Counsel for the Crown contends that the part of the judgment which I have set out above, in which Lord Denning MR recasts the principle which he stated, in *McWhirter's* case, was disapproved by Lord Wilberforce in his speech in *Gouriet v. Union of Post Office Workers.* This is undoubtedly correct in so far as Lord Denning MR's observations were directed to relator proceedings. *Gouriet's* case was of course not concerned with the prerogative orders, as to which Lord Wilberforce made this passing observation [1977] 3 All ER 70 at 84; [1978] AC 435 at 482).

At the earlier hearing before me Counsel for the respondents did not dispute the applicability of the principle of judicial review but contended that the *locus standi* of an applicant for declaration should be subjected to more stricter tests in this country. The case of *Kuluwante v. Government of Malaysia* [1978] 1 MLJ 92, where it was held that the applicant to a declaratory decree must establish immediate personal right or interest, and *District Council Central Province Wellesley v. Yegappan* [1966] 2 MLJ 177, where it was stated he must have recognised legal rights, were cited in his argument. In my view the Judge in *Kuluwante's* case was not only expressing the term 'right' to include 'interest' but was clearly of the view that some legitimate expectation to such interest is sufficient to entitle an applicant to an action for declaratory judgment. At p. 94 Yusoff J, applying the authority in *Schmidt v. Secretary of State Home Affairs* [1969] 2 Ch 149, said:

> With respect I do not agree with this contention. In an action for a declaratory judgment, the plaintiff has of course to establish her title to sue. She has to establish that she has an immediate personal interest in the subject-matter of the proceedings and in claiming a declaration which relates to legal right, in my opinion, all that she has to establish is that she has some legitimate expectation of such right or interest. In *Schmidt v. Secretary of State, Home Affairs,* Lord Denning, in relation to the right of hearing in a declaratory action by an alien, said:
>
> > It all depends on whether he has some right or interest, or I would add, some legitimate expectation of which it would not be fair to be deprive him without hearing what he has to say.
>
> The circumstances of the present case show that both the plaintiff's parents, brothers and sisters are federal citizens and for that reason she has a legitimate expectation to citizenship and, in my view, she cannot be debarred to have assess to this Court by reason only that she is not a citizen. For the purpose of this claim for declaration, I hold that the plaintiff has the requisite *locus standi.*

The case of *District Council Central Province Wellesley v. Yegappan, supra* is distinguishable from the present one. In that case the Federal Court held that the applicant's mere dissatisfaction with the approval of the planning authorities does not constitute a wrongful deprivation of his rights and therefore does not place him within the category of 'a person aggrieved'. The Federal Court therefore held that his interest was too remote. In the course of delivering the Court's judgment, however, Abdul Aziz J went on to say that the applicant will have his legal rights if the act complained of is done in contravention of the law. Page 182 of the judgment reads:

> *Certiorari* is not available in vindicating mental or sentimental injury. The fact that his neighbour's backyard will face his (the objector's) front lawn or his sitting room is naturally a matter of interest or, to put it a bit higher, a matter of grave concern to him. But that does not give him a legal right to object. He will have legal right to object and, therefore, *locus standi* if the adjoining buildings are going to be put up in **contravention of the law** and the breach of its nature would materially affect his legal right. The existence or otherwise of this element called legal right depends upon the facts of each case and the burden is on the objector to show that his proprietary rights have been injured ... (My emphasis.)

In the present application it is the applicant's contention that the land was unlawfully given to Tan Sri Othman Saat in contravention of Article IV (9) of the Second Part of the Johore State Constitution. I agree with Mr. C.K.G. Pillay, Counsel for the 1st respondent, that the facts available in the applicant's affidavit alone appear insufficient to constitute actual contravention of that provision in the State Constitution, but, to my mind, the facts disclosed therein, remaining unrefuted as they now stand, may constitute an offence of corrupt practice under the Emergency (Essential Powers) Ordinance No. 22 of 1970, which is nevertheless an unlawful, if not a criminal act.

What kind of interest must an applicant have before he can move the Courts into declaring a wrongful act of a State authority? The more recent cases show that he can do so in an application for judicial review by showing that he has sufficient interest in the matter. In the case of *R. v. Inland Revenue Commissioners, supra,* it was described as any person aggrieved by the failure of a public authority to do its duty. In that case the Court cited with approval the following passages from *Attorney-General of the Gambia v. N'Jie* [1961] 2 All ER 504, 511:

> The words "person aggrieved" are of wide import, and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because something has been done or omitted to be done contrary to what the law requires.

In the same case Lord Denning MR reiterated what he had propounded in *R. v. Greater London Council, ex parte Blackburn* [1976] 3 All ER 184, 192:

> I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a Government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced, and the Courts in their discretion can grant whatever remedy is appropriate.

Further down the judgment Ackner LJ opined:

> I cannot see any logical distinction between the position of a ratepayer who can reasonably assert that he has a genuine grievance if there is unfairness between his assessment and that of others in the same rating area, whether or not his pocket is affected, and the position of a taxpayer who can reasonably assert that his sense of justice or fairness is offended by the unlawful act by the Revenue in allowing his fellow taxpayers not to pay their tax. They have each in common the ability reasonably to assert a genuine grievance and that it seems to me to be 'a sufficient interest' to give them each a *locus standi.*

The facts in this present application show firstly that the applicant had made an application, though not in the formal application form, which was taken up with 183 others and submitted to the Executive Council for consideration. He was therefore entitled to a right to be considered and a formal reply from the Council. At that stage he had acquired an interest in the form of his expectation in respect of his application (see *Kuluwante's* case as discussed earlier). Is he not an 'aggrieved person' when his application for the land was ignored for 8 years while large pieces of land in that vicinity were being carved out and allotted to the 1st respondent as well as other rich and influential dignitaries? True, the allocation to these 9 or 10 persons will not cover the entire eligible land in Mersing, but they do jeopardize the applicant's chances as there will now be fewer pieces of land for alienation. I would certainly hold that he has an interest.

Even if he has not, he may still stand as a person having sufficient interest in the alienation of the 13,000 sq. ft. of land to the 1st respondent. The alienation was alleged to have been carried out by the Executive Council in the presence and with the participation and connivance of the 1st respondent, who is the Mentri Besar. The allegation, if true, constitutes a serious and unlawful act by the State's senior-most member of the administration for which act he may be exposed to both civil and criminal proceedings. In such circumstances the applicant and indeed every citizen, especially one with expectation for alienation of State land, should be properly construed as a person having sufficient interest in applying for a declaratory decree. In a Government so firmly founded on the principles of justice and the rule of law, the Judiciary cannot idly stand as a silent and stony pillar of democracy. The Court, in its role as a public watch dog, is not expected to turn a deaf ear to the prevailing public outcry against corruption and abuse of administrative powers by authorities or their officials, however high in rank. The time has come for public authorities to be compellable to perform their duties constitutionally and, if they transgress any law or constitutional directive, then any public-spirited citizen, even if he has no greater interest than a person having regard for the due observation of the law, may move the Courts and the Courts may grant him the appropriate legal remedy available at their discretion. Public interests demand that a wider and more liberal construction be given to the class of persons who could qualify as having a right or interest to such a remedy. In our Courts the mendicant may in appropriate circumstances challenge the act of a Minister if the exercise of such act appears to be unlawful, or against public interest. I would hold that the English authorities on the subject of 'sufficient interest' in a judicial review equally apply to our Courts.

For the above stated reasons I hold that the applicant in this case has *locus standi.* There were other issues such as the citing of persons not joined as parties in the application. I shall be dealing with these only after hearing the substantive motion and not in this application to strike out.

The 2nd and 3rd respondents made an attempt to strike out the motion when the 1st respondent's motion to strike out came up for hearing. The records of proceedings, however, show no visible sign of any written application having been made by either of them. The motion to strike out proceedings were clearly made by the 1st respondent alone as evidenced by the notice of motion itself, wherein it was stated that the Court will be moved by Dato' Haji Hassan Yunos and Mr. C.K.G. Pillay, Counsel for Tan Sri Othman Saat, the 1st respondent, and also at the bottom where it was disclosed that the motion was filed by the solicitors for the 1st respondent. Nowhere was it mentioned that the application was made on behalf of the 2nd and 3rd respondents as well. Order 2 r. 2 of the Rules of the High Court reads:

> (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
>
> (2) An application under this rule may be, made by summons or motion and the grounds of objection must be state in the summons or notice of motion.

The 2nd and 3rd respondents' submission does not merit consideration for non-observation of this rule. Filing an irregular application and not filling one at all have two completely different implications. The irregular one may be saved by O. 2 r. l but in a case of an *impromptu* oral application it must necessarily embarrass not only the unprepared applicant, who, until then, had no notion of an application being made to strike out, but also the Court. The oral applications made by the 2nd and 3rd respondents are refused.

There remains one other matter to be considered, i.e., the application by the applicant for leave to cross-examine the deponent, Dato' Haji Abdul Kadir bin Haji Sam'on, who affirmed the affidavit in reply on his behalf and on behalf of the 1st and 3rd respondents. Mr. Nijar, Counsel for the applicant, submitted that there is no rule of the High Court which authorizes one respondent to file an affidavit for another and that, as only the 1st respondent could furnish the Court with the necessary facts to render his action lawful or otherwise, he should be made available for cross-examination. My own impression of O. 38 r. 2(3) is that it does not empower this Court to order the attendance for cross-examination of persons other than the deponents. Accordingly there shall be an order for the 2nd respondent to attend this Court and be cross-examined at a subsequent date to be fixed by the Senior Assistant Registrar. The application in respect of the 1st respondent, Tan Sri Othman Saat, is hereby refused.

Be it so, the 1st respondent must be aware of the seriousness of the allegations against him and the implications and consequences of his omission from personally filing an affidavit in reply.

Lastly the application by the 1st respondent to strike out is hereby refused and the trial in respect of the substantive motion shall be heard.

Also found at [1982] CLJ 553